



# Revelations of the Lithuanian Defector Episode of November 23, 1970<sup>†</sup>

## *Epitaph*

Let's face it. Most Americans today are simply fed up with government at all levels. They will not—and should not—continue to tolerate the gap between promise and performance.

From—

President Richard M. Nixon's  
State of the Union Address,  
January 22, 1971

## **Presidential Perspective**

President Nixon, when asked at his press conference of December 10, 1970 for his personal view of the incredible episode involving a Lithuanian defector beaten on board a U.S. Coast Guard Cutter, replied:

Well, as I have already indicated, I was, as an American, outraged and shocked that this could happen. I regret that the procedures of the Coast Guard informing the State Department and the State Department informing the White House were not adequate to bring the matter to my attention. I can assure you it will never happen again. The United States of America for 190 years has had a proud tradition

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†The opinions expressed in this article, which is based on the Report for 1970–1971 of the Committee on Regional Treaty Organizations, Section of International Law, American Bar Association, of which he is Chairman, are his own.

of providing opportunities for refugees and guaranteeing their safety, and we are going to meet that tradition.<sup>1</sup>

### **Memoranda for the President**

President Nixon's reply of December 10, 1970, placing the scandalous Kudirka episode in perspective, emphasized certain procedural defects in communications capable of correction and thereby preventing any similar episode in the future. His reply was apparently based on information presented to him in two memoranda on the subject: "Attempted Defection by a Crew Member of the *Sovetskaya Litva*."

The first "Memorandum for the President" was submitted by the Secretary of Transportation and was dated December 2, 1970. At the outset it was stated what the attached report covered:

The report reflects only the facts as we know them to be at this time based on a preliminary review of written memoranda, messages, logs and telephone conversations. A formal inquiry is now being conducted so that all facts and circumstances can be fully developed. A complete report, based on that inquiry, will be submitted as soon as possible.<sup>2</sup>

The second "Memorandum for the President" was submitted by the Department of State over the signature of U. Alexis Johnson, Undersecretary for Political Affairs, and was dated December 6, 1970. Its scope was reflected in these prefatory remarks:

In response to your requests, a thorough investigation has been carried out with respect to the involvement of Department of State personnel in the case of the member of the crew of the Soviet ship *Sovetskaya Litva* who attempted to seek asylum on the Coast Guard Cutter *Vigilant*. There follows a detailed report of the results of this investigation, which was carried out in consultation with the Coast Guard Headquarters in Washington and the Department of Transportation. However, it does not deal with the facts of the events on board the two ships and in Boston except as reports thereon were received by the Department of State.<sup>3</sup>

### **International Law Aspects—Enclosure No. 12 and Departmental Inaction**

This Department of State "Memorandum for the President" contained, as Enclosure No. 12, "International Law Aspects of Attempted Defection of Lithuanian Seaman at Martha's Vineyard," discussing the norms of

<sup>1</sup>Press Conference No. 12 of the President of the United States, 7:00 P.M. EST, December 10, 1970. File copy of the Office of Press Relations, Room 2109, The Department of State, p. 15.

<sup>2</sup>The Secretary of Transportation, Washington, D.C. 20590. Memorandum for the President—Subject: Attempted Defection by a Crew Member of the *Sovetskaya Litva*. Dec. 2, 1970. Title page.

<sup>3</sup>Department of State, Washington. Memorandum for the President—Subject: Attempted Defection by a Crew Member of the *Sovetskaya Litva*. Dec. 6, 1970. p. 1.

international law with respect to fraudulent conduct as applied to the Kudirka episode:

If, however, the cooperation of the United States Coast Guard was obtained by fraud, then the Soviet actions would constitute a breach of international law. In this connection it is noted, as the Commandant of the Coast Guard has stated publicly, that "the Soviet Master alleged that the defector had stolen \$2,000 from the ship's fund." If the decision to deliver the seaman to the Soviet ship was based on this allegation of theft, and such allegation was false, then the Soviet authorities would be guilty of a violation of international law, since their conduct would constitute fraud.<sup>4</sup>

Missing from the discussion of the international-law aspects of this element of fraud, was any reference to the sworn statement, describing the Soviet allegation of theft as a "fabrication," which was made by the Commanding Officer of the *Vigilant* November 30, 1970, and is quoted below in footnote 4. Apparently Commander Ralph W. Eustis had not actually perceived fraud in the Soviet allegation of theft, before Kudirka was given up.

After Kudirka was given up, the Department of State was evidently unwilling to use the conclusion reached by its own Office of the Legal Adviser, as to the guilt of Soviet authorities for making a false allegation of theft, to make possible the delivery of Kudirka to the Soviet ship. This, along with the testimony supplied by Commander Eustis demonstrating that there was no money among Kudirka's personal effects left with Eustis before he was returned, could have supported a formal protest of a Soviet violation of international law. When pressed obliquely on this point by Representative John S. Monagan (D.—Connecticut), in Hearings before the Subcommittee on State Department Organization and Foreign Operations of the House of Representatives Foreign Affairs Committee, on December 7, 1970, Mr. William B. Macomber, Jr., Deputy Undersecretary for Administration, acted as if he had been unaware of Enclosure No. 12, although its reputed author, Assistant Legal Adviser Charles N. Browner, sat nearby:

MR. MONAGAN. Well, what, if anything, is being done now in the Government to bring about either a return of this man or a release of this man from the captive situation that he is in at the present time?

MR. MACOMBER. The question comes up: why don't we protest more formally and vigorously? And I must be very candid, it is very hard to protest when the Soviet sailors, or officers, came over, at our invitation, picked this

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<sup>4</sup>*Ibid.*, Enclosure No. 12, p. 2. In the part of the Verbatim Record (See note 9 *infra*) termed "Exhibits," in Board Exhibit No. 43, p. 3, was this statement: "At about 2030 hours, I received a written note from the Soviets, advising me that a member of their crew had stolen 3,000 rubles from their captain that morning and requesting that I search the *Vigilant* and return the man. Inasmuch as the defector gave me all his personal effects before he returned, and there was no money at all among them, I sincerely believe that the story about the theft was a fabrication."

man up, with our permission, and carried him back, in one of our launches, back to their boat. So we don't have very great grounds here for a protest.

I think the most effective thing that can be done—

MR. MONAGAN. Well, I certainly don't agree with that. I think that the knowledge of the situation that we have developed since the incident certainly showed that the original analysis on our part was wrong, and that this man should be treated as in fact being a defector from the beginning.

MR. MACOMBER. Well, I was going to go on to what I thought was the real answer to this, but there is certainly that problem, of our role in this. Everything the Soviets did, they did with our permission.

MR. MONAGAN. Has any communication been made by any part of the executive department asking for a return?

MR. MACOMBER. What we have done is expressed very, very clearly to the Soviet Government our concern and regret over this incident, our very deep concern.

But let me say that I think the best thing that we can do for Mr. Kudirka is keep the world news media and all world opinion focused on what happens to him. Let's find out what kind of a country the Soviet Union is. Let's find out how they treat people. Have the press constantly asking them, "What have you done with him?"<sup>5</sup>

### **World Public Opinion—Initial Deception of Americans**

It was not long before the approach advocated by Mr. Macomber as the "best thing," with its rationale in effect justifying American Executive Branch inaction, in officially seeking Kudirka's return by attributing to the press of the Free World a potent future restorative power, was shown in newspaper print to have been wishful thinking. The initial report from American correspondents in Moscow, early in February 1971, based on what were described as "reliable sources," made it appear that the Soviet Government and the Communist Party were graciously overlooking Kudirka's treasonable conduct. Both *The New York Times* and *The Washington Post* so reported, the latter in a front page feature item under a headline with no qualification as to source: "*Lithuanian Defector Is Living Well.*"<sup>6</sup>

### **The Voluminous Untapped Government Documentation**

Although there has been a Soviet blackout on information released<sup>7</sup> about the fate of the hapless Lithuanian, Kudirka, since the Coast Guard

<sup>5</sup>HOUSE OF REPRESENTATIVES. 91ST CONG. 2D SESS. ATTEMPTED DEFECTION BY LITHUANIAN SEAMAN, SIMAS KUDIRKA. *Hearings Before the Subcomm. on State Department Organization and Foreign Operations of the Comm. on Foreign Affairs* at p. 21 (Dec. 7, 1970).

<sup>6</sup>The Washington Post, February 12, 1971, p. 1. Also, see the more cautious headline for the same report: *SOVIET SOURCES SAY LITHUANIAN BARRED BY THE U.S. IS WELL*, The New York Times, Feb. 12, 1971, p. 8.

<sup>7</sup>Despite the official blackout, reports about Kudirka's fate were later filed by American journalists in Moscow during 1971. See, for example, dispatches of Bernard Gwertzman: *Lithuanian Barred by U.S. Is Now Reported Jailed While Soviet Studies Treason Charge*,

returned him to Soviet authorities while in United States territorial waters off Martha's Vineyard on November 23, 1970, it is inexcusable that American lawyers and legal scholars, to say nothing of skeptical newspapermen, have as yet failed to check the American record, in the form of government documentation, with a view to improving on the distorted version of the episode accepted throughout the United States. A study of the voluminous documentation issued subsequent to the Presidential statement of December 10, 1970 (none of it branded with a TOP SECRET or any other classification), will demonstrate why the current version of the Kudirka episode based on the initial, fragmentary claims is very inadequate.

On December 21, 1970, Secretary of Transportation John A. Volpe issued the complete report, based on a formal inquiry, promised to President Nixon December 2. Secretary Volpe and Admiral Chester R. Bender, Commandant of the Coast Guard, gave out under a press release, as a single unit, the findings and related documentation concerning three Coast Guard officers, suspected of possible violation of certain articles of the Uniform Code of Military Justice, in connection with the attempted defection of Lithuanian seaman Kudirka to the Coast Guard Cutter *Vigilant*.

The three items given out were: (1) the 77-page Report dated December 17, 1970, of the "Formal Board of Investigation into allegations of improper conduct in connection with recent defection attempt of Soviet crewman to CGC *Vigilant* near Martha's Vineyard, Massachusetts, on 23 November 1970"; (2) the 5-page Memorandum dated December 18, 1970, entitled "Action of the Convening Authority," in which the Formal Board of Investigation's Report was reviewed by Commandant Bender, who had convened the Board on November 30, 1970; and (3) the 1-page Memorandum dated December 21, 1970, entitled "Direction on your action on the Formal Board of Investigation, Coast Guard Cutter *Vigilant* Case," constituting Secretary Volpe's final review and decision as addressed to the Commandant, by which the two senior officers at Boston were allowed to retire without court martial, and the junior officer in New Bedford was transferred to new duties.

Not given out but referred to in the Volpe-Bender Press Release dated December 21, 1970, was "The complete transcript of the proceedings of the Board of Investigation," i.e. the basis of the Report to the Commandant by the Formal Board of Investigation. These Proceedings and this Report, with the list of exhibits for both, together totaled, by my count, 908 numbered and 10 unnumbered pages. Collated in 4 volumes it was all made

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The New York Times, March 10, 1971; and *Four Riga Jews Given Terms to Three Years*, The New York Times, May 28, 1971, p. 1. Also see the editorial *A Treasonous Act*, The Evening Star, Washington, D.C., June 1, 1971, p. A-8.

available for inspection on December 21, 1970, at Coast Guard Headquarters in Room 8315 of the NASSIF Building, 400 Seventh Street, S.W., Washington, D.C. In addition to evidentiary material labeled "Exhibits," the verbatim records of the Board's Proceedings incorporated lengthy proceedings held December 1-4 in Cambridge, Massachusetts, and December 8-10 in Washington, D.C. and also very brief proceedings held December 16, in Cambridge, Massachusetts.

### **The Coast Guard's Formal Board of Investigation**

Twenty-eight witnesses, including four from the Department of State, testified under oath before the one-member Formal Board of Investigation, namely Vice Admiral Thomas R. Sargent, III, appointed pursuant to the Commandant's Order dated November 30, 1970.<sup>8</sup> Admiral Sargent's remarks during these Proceedings served to clarify the investigative function of this particular Board, which would not consider the interim reports to President Nixon of December 2 and 6, 1970, but would develop its own independent record based on sworn testimony and legal exhibits. Admiral Sargent noted: "This is a board of investigation, it is not a court."—the purpose of which is "to get all the facts down."<sup>9</sup> Later, on December 8, he stated:

Furthermore, let the record show that my next statement is very unusual, but I consider it completely necessary. The board takes notice of a vast amount of publicity accorded to this case, and that the interim reports issued by the President—to the President, by the Departments of State and Transportation, headlines in the newspapers, comments on radio and television, have certain conclusions that have been drawn. Now, let the record show that the board has not seen either of the reports to the President—referred to. And, that the board asserts that whatever determination may be made, will be made—will be based on the testimony before the board and the legal exhibits enclosed. The board again asserts its impartiality and completely unbiased and uninfluenced by the nonrecord material of the press.<sup>10</sup>

The final paragraph in the Preliminary Statement of the Formal Board of Investigation's Report defends the Board's findings against prior non-record press accounts of the Kudirka incident:

[5.] Some of the material discussed in the following report of investigation

<sup>8</sup>According to this Order, appointing the Formal Board of Investigation, "Testimony of witnesses shall be taken under oath and the proceedings shall be recorded verbatim."

<sup>9</sup>Verbatim Record of the Proceedings Conducted at U.S. Coast Guard Headquarters Washington, D.C., 8-10 December 1970, by VADM Thomas R. Sargent, III, USCG, as President of a Formal Board of Investigation Appointed by the Commandant United States Coast Guard—To inquire into allegations of improper conduct in connection with the defection attempt of a Soviet crewman to USCGC *Vigilant* near Martha's Vineyard, Massachusetts, on 23 November 1970. p. 97.

<sup>10</sup>Verbatim Record . . . 8-10 December 1970. . . pp. 2-3.

is in conflict with earlier accounts of the incident appearing in newspapers and elsewhere, but it is felt that the instant report is authoritative.<sup>11</sup>

This Formal Board of Investigation can certainly be faulted for its failure to take testimony from the only Russian-speaking American official present throughout the entire incident. As a fisheries expert primarily, and as the Russian interpreter for the American side only incidentally, Alexis Obolensky, National Marine Fisheries Service, Department of Commerce, was uniquely qualified to testify. The fact that the Coast Guard assumed incorrectly<sup>12</sup> that Obolensky represented the State Department rather than the Commerce Department, may have been the reason why he was not called by the Board. Despite this serious omission in its panel of witnesses, the Board's Report of the Kudirka incident is unquestionably the most authoritative one available.

### **Facts Discovered by the Board**

The Formal Board of Investigation ferreted out many distressing facts which, without prejudging the matter, should whet the appetite of all who desire to understand better this scandalous Kudirka incident. For example, Captain Wallace C. Dahlgren, Chief of Intelligence Staff for Admiral Robert E. Hammond, Chief of Operations, U.S. Coast Guard Headquarters, and the Admiral's choice to handle the possible defection attempt reported from Boston, appeared at Coast Guard Headquarters Communications Center at approximately 1330 hours on November 23, 1970, to pick up a double-headed message classified *Secret* originating from the *Vigilant*, but was not given it inasmuch as he was "not on the cleared list."<sup>13</sup>

Disclosed in testimony under oath, was the unimpressive role of the Coast Guard Headquarters observer from Admiral Hammond's law enforcement staff on the U.S. Delegation to the Soviet-American talks on alleged Soviet excess catch of yellow tail flounder. This representative of the law enforcement unit under Captain Francis D. Heyward, was referred to as Lt. Leo M. Moorehouse, Jr. (according to the U.S. Department of Transportation Telephone Directory of October 1970, Lt. Leo A. Moore-

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<sup>11</sup>Preliminary Statement dated December 17, 1970, from VADM Thomas R. Sargent, III, 1670, USCG to Commandant, on the subject of the Formal Board of Investigation. This Preliminary Statement constituted the first item in the 77-page Report of the Formal Board of Investigation, and consisted of 5 numbered paragraphs.

<sup>12</sup>*Ibid.*, Paragraph 4. Alexis Obolensky did testify before the House Subcommittee on December 18, 1970; for an appraisal, see House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. p. 170.

<sup>13</sup>Verbatim Record . . . 8-10 December 1970. . . . p. 74.

house, Jr.). He explained his mission and described his activities at these talks:

Q. What was your mission?

A. Mainly just information purposes as a Headquarters representative. I work in the Laws and Treaties Branch at Headquarters for Fisheries.

Q. Who is your boss at Headquarters?

A. Captain Heyward is chief of the division.

Q. What specific instructions did you get before this trip?

A. I didn't receive any instructions.

Q. To watch?

A. To watch. An observer mainly, to listen to the talks, to hear what was said.

Q. I take it that you were not there to offer advice to anyone?

A. Yes, sir. I believe I was asked one question by the Russians during that afternoon session, that was my only involvement.

Q. Were you there to give advice of any kind to CDR Eustis?

A. No, I don't believe so.

Q. Were you required to bring back a report to headquarters?

A. No, I didn't submit any report. Mainly orientation for myself at headquarters working with the fisheries laws.

Q. How long had you been at your job in headquarters?

A. I believe I reported on 28 August of this year.

Q. This was the first trip of this type?

A. Yes.<sup>14</sup>

### **A Most Distressing Disclosure—Mooring Partner Unknown**

Perhaps the most distressing situation disclosed in the Proceedings, was an inexcusable error of mistaken identity of the Soviet vessel to which the Coast Guard Cutter *Vigilant* was moored, port side, in Menemsha Bight on November 23, 1970. According to Board Exhibit #22, which was the *Vigilant's* Log for Monday, November 23, 1970, the entry for 1200 to 1600 hours began:

MOORED AS BEFORE, PORT SIDE TO SOVIET F/V ZAPRYBA  
KALININGRAD IN POSITION 41 22.2'N 70 46.9'N.<sup>15</sup>

In point of fact the *Vigilant*, a cutter of 210 feet and less than 1,000 tons, was then moored, as it had been since 1030 hours, to the *Sovetskaya Litva*, a mothership 500 feet in length and displacing more than 14,000 tons. Shown a message from *Vigilant* the morning of November 23, describing its mooring partner as the *Kaliningrad*,<sup>16</sup> the Commanding Officer of the *Vigilant* testified:

This name is the name of the vessel that we had received in our last message from the Commandant that we were going to rendezvous with. I had

<sup>14</sup>Verbatim Record . . . 1-4 December 1970. . . pp. 199-200.

<sup>15</sup>Board Exhibit #22—Cutter *Vigilant* Log, Monday, 23/11/70, p. 2.

<sup>16</sup>Board Exhibit #9B—Telegraphic message sent 1058 hours.



no reason to believe the vessel I did in fact rendezvous with was not the same vessel.<sup>17</sup>

When Counsel for the Formal Board of Investigation then asked if this Soviet vessel had a name on the stern, Commander Ralph W. Eustis replied:

The Soviet vessel had its name on the stern and on the bridge wing, however, it was in Gailic<sup>TRS</sup> [sic] and initially no one made any effort to translate it into English.<sup>TRS</sup> Later on we found we had a different vessel.<sup>18</sup>

### **“See Your Lawyer First” – Washington, D.C.**

Did operational personnel of either the Coast Guard or the Department of State, after becoming involved in the Kudirka episode on November 23, 1970, heed the admonition often emphasized by State Bar Associations, for example, the Kansas Bar Association, — “See Your Lawyer First.?” The Verbatim Record contains interesting testimony on this score. In the course of cross examination, Admiral Hammond, the Coast Guard’s Chief of Operations, stated:

I’ll tell you exactly, it never entered my mind to call our legal office. This I realize was a mistake. I thought by going to the State Department we were getting first hand knowledge and it just did not occur to me to call our legal office.<sup>19</sup>

And yet Admiral Hammond had declared earlier that, based on his experience in dealing with the Department of State, while serving in Alaska as District Commander in the Seventeenth District, it was virtually impossible to obtain meaningful guidance from that Department on a timely basis:

My exact thought was that while I was disappointed, I was not surprised. We had many times—I served two years in Alaska, in which I had several incidents with Russian fishermen, and I’ve spent all night trying to get a decision out of State Department through Coast Guard Headquarters, and been completely unsuccessful in every attempt. . . .<sup>20</sup>

In another part of the city of Washington on November 23, 1970, operational personnel of the Department of State had also been oblivious to the benefits to be derived from in-house counsel. In testimony given by

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<sup>17</sup>Verbatim Record . . . 1–4 December 1970. . . pp. 221–222.

<sup>18</sup>*Ibid.*, pp. 222–223. In the original testimony the initials TRS (presumably Vice Admiral T. R. Sargent in his capacity as the one-member Formal Board of Investigation) appear over the words “gailic” and “english.” Apparently he attempted to correct the spelling of the two words by capitalizing the initial letter. In a record replete with typographical and other minor errors, it is probably too much to expect a completely proper spelling of the word Gaelic, much less a change to Cyrillic.

<sup>19</sup>Verbatim Record . . . 8–10 December 1970. . . p. 58.

<sup>20</sup>*Ibid.*, p. 36.

Edward A. Mainland of the Soviet Union desk in the Bureau of European Affairs, this exchange occurred:

Q. Was the Office of Legal Affairs contacted?

A. Well, in my hindsight, I know now they were not.<sup>21</sup>

### **“See Your Lawyer First” — Boston**

Meanwhile, surprisingly enough, in Boston’s John F. Kennedy Building, the operational personnel of the First Coast Guard District had more than adequate access to Coast Guard lawyers with offices there, and their advice was in fact sought and given. Captain Fletcher W. Brown, Jr., Chief of Staff of the First Coast Guard District, did discuss legal aspects of the Kudirka episode as it developed during the afternoon of November 23, 1970. According to District Legal Officer, Commander Jerome V. Flanagan, Captain Brown had the benefit of three separate discussions on legal aspects of the Kudirka incident between 1330 and 1630 hours, the legal advice being supplied by Commander Flanagan and his staff.<sup>22</sup> However, the First Coast Guard District Legal Officer did not contact Coast Guard Headquarters for legal advice from his superiors:

Q. Did you have communications with the Commandant Legal people at all?

A. No, I didn’t call Commandant Legal at all. I thought that since the message was double headed and sent to Headquarters Operations it would be referred to Legal and that’s why I expected a definite answer. I felt that Legal in Headquarters and the State Department would come back with some kind of response.<sup>23</sup>

### **The Essence of the State Department Response to the Coast Guard**

What actually was the response of the Department of State relayed to Coast Guard Headquarters in Washington? Perhaps the most authoritative answer was the one provided by Deputy Undersecretary for Administration William B. Macomber, Jr., the sole Department of State representative to appear as a witness before the House of Representatives Foreign Affairs Subcommittee on State Department Organization and Foreign Operations chaired by Wayne L. Hays (D.—Ohio), who directed the investigational Hearings in Room 2172 of the Rayburn House Office Building. Mr. Macomber succinctly characterized the Department of State’s contribution to the outcome of the Kudirka incident:

I regret very much that they had this man for seven and a half hours, despite our request that we be kept informed of any developments, and

<sup>21</sup>*Ibid.*, p. 242.

<sup>22</sup>Verbatim Record . . . 1–4 December 1970. . . pp. 152–156, at p. 156.

<sup>23</sup>*Ibid.*, pp. 155–156.

despite an indication that we could give guidance as soon as we knew of those developments.<sup>24</sup>

When subsequently drawn out by Representative Monagan, Mr. Macomber amplified this description of his Department's possible future guidance for the Coast Guard:

MR. MONAGAN. You said, I believe, that the Department in effect said, "Don't do anything," to the Coast Guard, "until you hear from us."

MR. MACOMBER. Two things. Yes; we said, "Keep us informed, and we will give you guidance, once the defection takes place."

MR. MONAGAN. Is that the same as "Don't do anything?"

MR. MACOMBER. No, we said, "Keep us informed, and we will give you guidance, once the defection takes place, and we will give you guidance on the basis of the facts then."<sup>25</sup>

### **The Hays Subcommittee and Its Work – A Critique and a Recommendation**

There were certain distressing revelations about the Kudirka incident which were unearthed through the investigational Hearings on the incident conducted by the Hays Subcommittee. It heard fifteen witnesses of which six were from the Department of Transportation and the Coast Guard. But by comparison with the revelations in the transcript of the Proceedings of the Coast Guard's Formal Board of Investigation, the revelations contained in the Hays Subcommittee Report of February 4, 1971, together with the Printed Hearings upon which this Report was based, were very insignificant. Despite an inordinate amount of publicity given to the Hays Subcommittee, on occasion Subcommittee members and even witnesses before the Subcommittee failed to distinguish themselves by not having done their homework thoroughly. For example, consider the following passage in the exchange between Mr. Macomber and Representative F. Bradford Morse (R.—Massachusetts) before the Hays Subcommittee on December 3, 1970:

MR. MACOMBER. Well, what happened at the start was that the Coast Guard, Captain Dahlgren of the Coast Guard called the one Coast Guard officer at the State Department—he works in the Science Office—and asked whom he should call. Dahlgren [sic] supplied him with the proper names.

MR. MORSE. Right.<sup>26</sup>

Had Representative Morse been better informed or more alert, he would have said "Wrong," because this Coast Guard officer on duty at the State Department was not Captain Dahlgren but Captain David A. Webb, and the names supplied by Webb were not "the proper names," for the first

<sup>24</sup>House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. p. 16.

<sup>25</sup>*Ibid.*, p. 21.

<sup>26</sup>*Ibid.*, pp. 17–18.

man subsequently called by Dahlgren was a man in the State Department's Office of Security untutored in things Soviet. And for a glimpse of the nature of some of Captain Webb's work in the State Department's Science Office one must rely on the Proceedings of the Coast Guard's Formal Board of Investigation:

Q. Do you do any liaison at all?

A. Practically none. I think Captain *Dahlgren's* call was the first, no—about the third telephone call I had received from anybody in the Coast Guard asking anything. I can't remember the others.

COUNSEL (LCDR FIDELL): Is your name in the Coast Guard Headquarters phone book?

WITNESS: No, sir.

COUNSEL (LCDR FIDELL): Are you found in any phone book accessible as a Liaison Officer?

WITNESS: No.

COUNSEL (LCDR FIDELL): How then would you say that anyone could find you as a Liaison Officer?

WITNESS: They would just have to know that I was over there.<sup>27</sup>

According to the Report of the Hays Subcommittee:

The Coast Guard district office in Boston, Coast Guard Headquarters in Washington, and the Department of State contributed in varying degrees to this inglorious episode.<sup>28</sup>

This as a conclusion is good as far as it goes. But it glosses over the fact that the mischievous bottle-neck in the Kudirka episode was Coast Guard Headquarters in Washington, a point established by Representative H. R. Gross (R.—Iowa) during the Hays Subcommittee Hearings on December 29, 1970:

MR. GROSS. But neither of you gentlemen was in communication in any way with the State Department either directly or indirectly. You had no information as to its position with respect to this matter.

ADMIRAL ELLIS. That is right. Anything we would hear would come through the Commandant.<sup>29</sup>

It should be noted that the gentlemen referred to by Representative Gross were Admiral William B. Ellis, Commander of the First Coast Guard District, and Captain Fletcher W. Brown, Jr., his Chief of Staff, who together with Commander Ralph W. Eustis, the *Vigilant's* Commanding Officer, comprised the three New England-based officers specifically designated "parties to the investigation" in the third numbered paragraph of

<sup>27</sup>Verbatim Record . . . 8–10 December 1970. . . . pp. 167, 180.

<sup>28</sup>House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. Report of the Subcommittee on State Department Organization and Foreign Operations. February 4, 1971. p. 1.

<sup>29</sup>House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. Hearings. p. 183.

the Commandant's Order dated November 30, 1970, appointing the Formal Board of Investigation. Thus from the outset the focus of the search for those with responsibility in the Kudirka matter was the Boston command post, and Washington was spared the ignominy.

Three Republican members of the Hays Subcommittee—F. Bradford Morse of Massachusetts, William S. Mailliard of California and Vernon W. Thomson of Wisconsin—jointly filed “Supplemental Views,” which consisted of two sentences.<sup>30</sup> They agreed that Kudirka's attempted defection had been outrageously handled, but jointly disassociated themselves from those assertions in the Report tending to assess the motivation of Admiral Ellis and Captain Brown, each of whom, they agreed, bore “a principal measure of responsibility” on November 23, 1970.

Those filing “Supplemental Views” could have made a much greater contribution to public and Congressional enlightenment, with respect to the blunders committed in the Kudirka incident, by urging that the Subcommittee Hearings issued simultaneously with the Report, be supplemented through publication of the most revealing documentation involved—the unclassified Report of the Coast Guard's Formal Board of Investigation, together with the transcript of all its Proceedings, nearly 920 pages in all.

Unfortunately, the ranking Republican member of the Hays Subcommittee was on record<sup>31</sup> as not having read by December 29, 1970, the testimony given by Admiral Ellis to the Coast Guard's Formal Board of Investigation, and may well have been unaware of the content of the testimony of witnesses of lesser rank due to pressures connected with adjournment of the Congress. Nevertheless, despite the embarrassment of past failures of omission and of commission, it is essential in my opinion that this relatively inaccessible documentation be brought forcibly to the attention of the American people as soon as possible. Unless this is done promptly, the significance of the Kudirka episode in the conduct of American foreign policy, with its many legal and organizational ramifications, could easily be substantially misunderstood and both President Nixon and Secretary Volpe forced to eat crow in view of their assurances that this would never happen again.

### **Hard Facts on Things Soviet:**

#### **State Department Guidance and Documentation in 1971**

Whatever the guidance eventually provided by the Department of State

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<sup>30</sup>House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. Report. p. 11.

<sup>31</sup>House of Representatives. Attempted Defection by Lithuanian Seaman Simas Kudirka. Hearings. p. 178.

to the Coast Guard, and whenever transmitted (the comprehensive, revised "Procedures for the Handling of Requests for Political Asylum by Foreign Nationals" to replace the "Summary Interim Procedures" were promised in due course being "in preparation" back on December 6, 1970), responsible officials unaware of hard, useful facts will inevitably err and err grievously. And the potential consequences of such erroneous decisions, compounded by veritable torrents of publicity, are enormous. Probably, as with fraud and deceit in American law and equity,<sup>32</sup> fraud and deceit Soviet-style can and should not be defined, each case being best resolved by judgment on its own peculiar facts.

For those faced with foreign nationals like Kudirka from one of the Baltic States—Estonia, Latvia and Lithuania—such judgment should be based on recent documentation, emanating from the Department of State: (1) the letter dated January 27, 1971 from Secretary of State William P. Rogers to Lithuanian Chargé d'Affaires Joseph Kajeckas to commemorate on February 16, 1971 the fifty-third anniversary of Lithuania's independence, which concluded with the statement:

The United States Government, by its continued non-recognition of the forcible incorporation of Lithuania, affirms its support for Lithuania's right of self-determination.<sup>33</sup>

(2) the three statements of two-sentences each as applied to entries for Estonia, Latvia and Lithuania in the latest annual edition of *Treaties in Force*, released February 8, 1971:

The United States has not recognized the incorporation of Estonia, Latvia, and Lithuania into the Union of Soviet Socialist Republics. The Department of State regards treaties between the United States and those countries as continuing in force.<sup>34</sup>

and (3) the letter dated May 7, 1971 from Assistant Secretary for Congressional Relations David M. Abshire to Chairman Thomas E. Morgan of the House of Representatives Committee on Foreign Affairs, giving the Department's comments on House Concurrent Resolution 7, "Expressing the sense of the Congress with respect to the incorporation of Latvia, Lithuania, and Estonia into the Union of Soviet Socialist Republics," and stating:

The United States has never recognized the forcible incorporation of the Baltic nations by the Soviet Union. Our attitude and actions have been consistent with this policy, as is evidenced by our continued accreditation of the diplomatic and consular representatives of the last free governments of the Baltic states. . . .<sup>35</sup>

<sup>32</sup>See *Fraud and Deceit*, 37 AM. JUR 2D § 1, pp. 17-21.

<sup>33</sup>Letter supplied by Legation of Lithuania, 2622 Sixteenth Street, N.W., Washington, D.C.

<sup>34</sup>*Treaties in Force*. Department of State Publication 8567.

<sup>35</sup>Letter supplied by Representative Frank Annunzio (D.—Illinois).

### **The Vital Protocol Which Was Overlooked**

Finally, from the standpoint of refugees in general, rather than those from Lithuania or even the Baltic States taken as a whole, belated notice must be taken of the most respected and widely applicable legal instrument binding upon the United States—the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967, which entered into force with respect to the United States, November 1, 1968.<sup>36</sup> Although this Protocol was a human rights document *par excellence*, constituting for many of the refugees involved the difference between life and death, and although the United States acceded to this Protocol during the year 1968 as Human Rights Year for the United States, neither accession as advised by the United States Senate, nor accession as approved by the President, nor deposit of the United States accession instrument with the United Nations Secretary-General, nor proclamation thereof by the President evoked any significant comment whatsoever in *The New York Times*. Only U.S. Senator Claiborne Pell seemed to appreciate its importance.<sup>37</sup> Of course, *The New York Times* partially redeemed itself by giving the Kudirka incident front page exposure on November 29, 1970 and thereby rescued a story about Kudirka buried on the Obituaries page of the *Boston Evening Globe* of November 25 which had somehow escaped the bureaucratic maw for State secrets.

### **Assurances by Secretary Rogers Deemed Premature**

In sum, it is respectfully submitted that Secretary of State William P. Rogers was premature when at his morning news conference on December 23, 1970, he concluded his remarks on the subject of the Lithuanian defector incident with the sentence:

I think the public has been fully informed about it, and we have taken whatever steps we think we can take to prevent a recurrence.<sup>38</sup>

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<sup>36</sup>Protocol Relating to the Status of Refugees. TIAS 6577.

<sup>37</sup>U.S. Senate. 90th Congress, 2d Session. Executive Rept. No. 14. p. 17.

<sup>38</sup>Department of State for the Press. No. 362. Secretary Rogers' News Conference, December 23, 1970. Transcript authorized for direct quotation. pp. 39–40, at p. 40.